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SUPREME COURT, U.S.

NO. 82-5630

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR,

Appellant

v.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court Of Criminal Appeals

APPELLEE'S MOTION TO DISMISS OR AFFIRM

MARK WHITE
Attorney General of Texas

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

JOHN W. PAINTER, JR.
First Assistant Attorney General

DOUGLAS M. BECKER*
BARBARA J. LIPSCOMB
Assistant Attorneys General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEYS FOR RESPONDENT

*Attorney of Record

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QUESTION PRESENTED

- I. WHETHER SECTION 30.02(d)(3), TEX. PENAL CODE (VERNON 1974) IS UNCONSTITUTIONALLY VAGUE FOR THE REASON THAT THE TERMS "INJURES" AND "ATTEMPTS TO INJURE" ARE NOT DEFINED IN THE STATUTE.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW The State of Texas, Appellee herein, by and through her attorney, the Attorney General of Texas, and moves the Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the Texas Court of Criminal Appeals.

OPINION BELOW

The opinion of the Texas Court of Appeals for the Second Supreme Judicial District is reproduced as Appendix A to Appellant's jurisdictional statement. The order of the Texas Court of Criminal Appeals overruling the petition for discretionary review is reproduced as Appendix B to the jurisdictional statement. Appellant was convicted in the district court of Wichita County, Texas, of violation of §30.02(d)(3) of the Texas Penal Code and sentenced to life imprisonment in the Texas Department of

Corrections. By opinion rendered April 28, 1982, the Court of Appeals for the Second Supreme Judicial District of Texas affirmed Appellant's conviction, sustaining the constitutionality of Section 30.02(d)(3) against Appellant's due process challenge. A timely filed petition for discretionary review with the Texas Court of Criminal Appeals was overruled on July 21, 1982.

This Court has appellate jurisdiction under 28 U.S.C. §1257(2) to entertain this appeal. Appellant raised the issue of the statute's constitutionality in the Court of Appeals and the decision was in favor of its validity.

CONSTITUTIONAL PROVISIONS AND
STATUTES INVOLVED

U.S. CONST. amend. XIV:

... nor shall any State deprive any person of life, liberty, or property without due process of law.

Section 30.02(d)(3), Tex. Penal Code (Vernon 1974):

- (a) A person commits an offense if, without the effective consent of the owner, he:
 - (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; or
 - (2) remains concealed, with intent to commit a felony or theft, in a building or a habitation; or
 - (3) enters a building or habitation and commits or attempts to commit a felony or theft.

* * *

- (d) An offense under this section is a felony in the first degree if:
 - (1) the premises are a habitation; or
 - (2) any party to the offense is armed with explosives or a deadly weapon; or
 - (3) any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building.

STATEMENT OF THE CASE

The Statement of Facts contained in Appellant's jurisdictional statement is substantially correct.

MOTION TO DISMISS

APPELLANT'S CONSTITUTIONAL CHALLENGE TO
§30.02(d)(3), TEX. PENAL CODE (VERNON 1974),
IS INSUBSTANTIAL.

Appellant committed the offense of burglary by entering a building which was not then open to the public with the intent to commit theft. According to the Texas burglary statute, the offense of burglary is normally a felony of the second degree; however, in this case, the jury found that Appellant had stabbed the shopkeeper repeatedly with one blade of a pair of scissors or shears. Therefore, under Subsection (d) of the statute, the offense was elevated to a felony of the first degree, and Appellant's punishment was assessed at life imprisonment. Appellant now argues that Subsection (d) violates the due process clause of the Fourteenth Amendment in that the term "injury" in that section is not defined specifically as physical injury, but could conceivably encompass damage to property or violation of a legal right. Hence, Appellant argues that the entire statute is unconstitutionally vague.

As discussed in Appellee's motion to affirm, infra, considering the statute as a whole, it is clear that the terms "injury" refers to physical or bodily injury. In any event, the issue as it is presented here is not sufficiently important to merit briefing or argument. A penal statute violates the due process clause only when it is so vague that it fails to fairly apprise a reasonable person of the conduct which is prohibited. E.g., Smith v. Goguen. 415 U.S. 566 (1975). This is not the case where the State has prosecuted a defendant for an action which is arguably not contemplated by the statute. Whatever else "injure" could mean, it clearly encompasses the sort of serious physical

assault which the jury found had occurred during this burglary.^{1/} Appellant's purely speculative argument regarding the possible meaning of the statute under some strange interpretation does not raise a serious due process question worthy of this Court's plenary consideration. The issue should therefore be treated as insubstantial, and the appeal dismissed.

MOTION TO AFFIRM

THE TERM "INJURY" AS USED IN §30.02(d), TEX. PENAL CODE (VERNON 1974), IS NOT UNCONSTITUTIONALLY VAGUE.

Appellant takes the position that since the term "injury" is not specifically defined in Texas burglary statute, neither the state courts nor the federal courts have the power to supply a meaning. It has always been an important function of the courts, however, to apply statutory law according to well-recognized rules of construction. In Texas, these rules are codified as Article 5429b-2, Tex. Stat. Ann. (Vernon Supp. 1982), the Code Construction Act, and that act is specifically applicable to the Texas Penal Code. Applying these rules of construction to the issue at hand, then, it is clear that §30.02(d)(3) refers to physical injury.

First, in construing the statute, it must be presumed that the entire statute is to be effective. Parr v. State, 575 S.W.2d 522 (Tex.Crim.App. 1979); Article 5429b-2 §3.01(2). As the Texas Court of Appeals pointed out, "to construe the phrase 'injure another' to include violation of a legal right or property damage would be superfluous. Damage to property and violation of a legal right exists upon the occurrence of the burglary." (Appendix A at 10). According to Appellant's view of the statute, the entire Subsection (d)(3) would add nothing whatsoever to the operation of the statute. If that subsection refers to physical injury, however, the section is meaningful.

^{1/} It is interesting to note that Appellee has located no cases where a defendant was prosecuted under this subsection for anything other than serious physical injury.

Moreover, such a reading is consistent with the apparent legislative intent. The Texas Code Construction Act specifically invites a court to consider among other matters the legislative history of an act and common law or former statutory provisions, including laws upon the same or similar subjects. The current Texas burglary statute, §30.02, was enacted in 1974 as part of the new Texas Penal Code. Section 30.02 encompassed several sections of the old code, including Article 1164, which set out a separate offense called "assault in attempting burglary". That article provided that:

If any person in attempting to commit burglary shall assault another, he shall be confined in the penitentiary for two to five years.

Acts, 1973, 63rd Leg. p. 883, ch. 399 §1. In the new penal code, rather than constituting a separate offense, an assault during burglary or attempted burglary simply escalates the primary offense from a second degree to a first degree felony. This suggests that Subsection (d)(2) was intended to refer specifically to physical injury.

An examination of similar statutes in the new penal code supports Appellee's reading of the statute. For instance, the penalties for theft, robbery, and arson are similarly enhanced if the primary offense results in bodily injury. See, Tex. Penal Code §§28.02, 29.03, and 31.03.

Finally, a reading of §30.02 itself tends to the conclusion that Subsection (d) is intended to deter injuries to persons in the course of what otherwise would be a property crime. As the Court of Appeals noted, the remainder of Subsection (d) escalates the offense to a first degree felony if (1) the building is a habitation; or (2) if the actor is armed with a deadly weapon or explosives. The Code Construction Act admonishes construing courts to presume that statute is intended to reach a fair and reasonable result. In this instance, it is entirely reasonable that a harsher penalty be imposed where a burglar inflicts bodily harm or commits burglary under circumstances which increase the

probability that an innocent person will be injured. Thus, all the factors which the Court is required to consider in construing a statute such as this one compel the conclusion that the term "injury" in Subsection (d) means physical injury or bodily harm, and that meaning is clear even without a specific definition in the statute.

CONCLUSION

Wherefore, premises considered, Appellee respectfully prays that this Court dismiss the appeal for want of a substantial federal question or, in the alternative, affirm the decision of the Texas Court of Appeals.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY, III
Executive Assistant Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

Barbara J. Lipscomb
BARBARA J. LIPSCOMB
Assistant Attorney General

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PROOF OF SERVICE

I hereby certify that on the _____ day of November, 1982, one copy of the Respondent's Brief in Opposition was mailed, postage prepaid, to Mr. S. Price Smith, Jr., 210 Executive Building, Wichita Falls, Texas 76301. All parties required to be served have been served. I am a member of the Bar of this Court.

Douglas M. Becker
DOUGLAS M. BECKER
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this 12th day of November, 1982.

Barbara D. Pete
NOTARY PUBLIC in and for
Travis County, TEXAS